UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARJORIE FERRELL, et al., Plaintiffs, v. WYETH-AYERST LABORATORIES, INC., et al., Defendants.	Civil Action No. C-1-01-447 Judge Sandra S. Beckwith Magistrate Judge Timothy S. Hogan

END-PAYOR PLAINTIFFS' REQUEST TO SUBMIT SUPPLEMENTAL AUTHORITY IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

Pursuant to Southern District of Ohio Local Rule 7.2(a)(2), End-Payor Plaintiffs seek leave of Court to bring the Court's attention to five recent rulings that may assist the Court in resolving the pending motion for certification of an end-payor class. In support thereof, End-Payor Plaintiffs state as follows:

1. Plaintiffs filed their Motion for Class Certification, together with a supporting memorandum, on March 1, 2002 [Doc. No. 40]. Defendants filed their memorandum in opposition to Plaintiffs' motion on July 17, 2002 [Doc. No. 57]. On September 27, 2002, Plaintiffs filed their reply memorandum [Doc. No. 63].

2. With respect to Plaintiffs' argument concerning certification of a multistate or national class for unjust enrichment claims (Pl. Reply at 43-49), Plaintiffs respectfully direct the Court's attention to four recent decisions:

(a) In *Clark v. TAP Pharmaceutical Products, Inc.*, 343 Ill. App. 3d 538, 550,

798 N.E.2d 123,132 (2003), an appellate court upheld certification of unjust enrichment claims under the law of Illinois (defendants' principal place of business) for a nationwide class of pharmaceutical purchasers. In so doing, the court rejected defendants' contention that unjust enrichment claims required "a physician-by-physician evaluation ... to determine why each physician decided to administer [the drug] Lupron." 798 N.E.2d at132. The court concluded that "[w]e agree with the plaintiffs' reasoning and conclude that common issues, regarding both the plaintiffs' consumer fraud claim and the plaintiff's unjust enrichment claim, predominate over the issues that affect only individual members." *Id.*

(b) In *In re Relafen Antitrust Litig.*, No. 01-CV-12239 Order (D. Mass. Nov. 21, 2003) (attached as Exhibit A), the court certified a five-state exemplar (or model) class of end-payors of a prescription drug for unjust enrichment claims. The exemplar states were Arizona, California, Tennessee, Vermont and Massachusetts. Three consumers were certified as class representatives.

(c) In *Mantz v. St. Paul Fire and Marien Ins. Co.*, No. Civ. A. 02C-770, 2003 WL 23109763 (Cir. Ct. W. Va. Dec. 17, 2003) (attached as Exhibit B), the court certified a national class for unjust enrichment claims. *See id.* at *7 ("Individual issues of state law pose no impediment to a finding of predominance in that this Court can apply substantially uniform law to claims with the same legal predicate. Alternatively, this Court may create sub-classes of Plaintiffs to ensure proper application of law. The key issue before this Court is the fact that Plaintiffs' claims are uniformly premised on the same factual predicate.").

(d) In *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 517-520 (E.D. Mich. 2003), the court certified a nationwide class of end-payors of a prescription drug for

purposes of settlement.[1]

3. With respect to Plaintiffs' argument concerning certification of a multistate class for damage claims under state antitrust or consumer fraud statutes (Pl. Reply at 41-43), Plaintiffs respectfully direct the Court's attention to two recent decisions:

(a) In *Relafen* (Exhibit A), the court certified an exemplar (or model) class of end-payors for claims arising under state antitrust or consumer fraud statutes of Arizona, California, Vermont and Massachusetts. Three consumers were certified as class representatives.

(b) In *Cipro Cases I & II*, Nos. 4154, 4220, 2003-2 Trade Cas. (CCH) ¶74,230, 2003 WL 23005275, *4 (Sup. Ct. Cal. Nov. 25, 2003) (attached as Exhibit C), the court certified a state-wide class of branded drug purchasers, stating that "[w]here, as here, Plaintiffs allege a market-wide restraint of trade, fact of injury is assumed for class certification purposes."

[1] In *In re Cardizem CD Antitrust Litig.,* 200 F.R.D. 326 (E.D. Mich. 2001), *leave to appeal denied*, No. 01-0109 (6th Cir. June 18, 2001), previously relied upon by Plaintiffs, the court certified a Michigan exemplar class for state antitrust and unjust enrichment claims. A motion to certify unjust enrichment claims for a national class was pending when the court certified a national class for purposes of settlement. Courts considering certification for purposes of settlement must apply the same Rule 23 standards, except that they need not "inquire whether the case, if tried, would present intractable management problems." *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997) (noting that the inquiry is unnecessary because "the proposal is that there be no trial") (citing Fed. R. Civ. Pro. 23(b)(3)(D)).

Dated: March 4, 2004

Respectfully submitted,

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